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Supreme Court, U.S.
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No. 00-454

IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents' brief in opposition confirms the need for review by this Court. First, respondents' argument demonstrates the considerable confusion among courts and litigants alike regarding tribal taxation of nonmembers. Respondents' brief does not defend the balancing test adopted by the court of appeals to uphold the tribal tax on hotel guests. It does not attempt to present a coherent theory as to how this case involves a consensual relationship between the hotel guests and the tribe as required by the first exception to the general rule of *Montana v. United States*, 450 U.S. 544 (1981). It does not attempt to reconcile the language of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), with the analysis of tribal authority over nonmembers more recently articulated by this Court in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Instead, respondents' brief asserts a blanket claim that the Navajo Nation has the right to tax all non-Indians entering the reservation under a third "inherent authority" exception purportedly derived from *Montana*. In short, respondents' brief confirms rather than dispels the doctrinal tension.

Second, respondents' brief illustrates the split between the Ninth and Tenth Circuits. Respondents rely at a critical point in their argument on the Ninth Circuit's decision in *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). But that decision has been expressly overruled by the Ninth Circuit itself. *See Big Horn Elec. Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000). Moreover, respondents do not dispute that the sequence of decisions in the principal circuits for tribal litigation has caused considerable uncertainty over the tax powers of the tribes – uncertainty which is confirmed by the several *amicus curiae* briefs filed here. This Court should grant the petition to address the important issue presented therein.

I. RESPONDENTS' BRIEF DEMONSTRATES CONSIDERABLE CONFUSION ABOUT THE PROPER STANDARDS TO APPLY TO QUESTIONS OF TRIBAL TAX AUTHORITY

Perhaps most telling in respondents' opposition brief is what it does not do: defend the court of appeals' decision on its own terms. The court of appeals adopted a multi-factor balancing test for determining whether an Indian tribe could tax nonmember conduct on fee land on the reservation. *See* Petition at 13 ("Pet."). Conspicuously absent from respondents' brief is any defense, or even mention, of this balancing test. As the petition pointed out, this test is both theoretically flawed and practically impossible to apply. The failure of respondents to defend the rationale of the decision below is a sign that certiorari is warranted.

Equally significant, respondents make almost no attempt to fit this case within the framework set forth in *Montana* and reaffirmed in *Strate* for dealing with assertions of tribal authority over nonmembers on fee land. Those cases recognized a relatively narrow exception permitting a tribe to "regulate ... through taxation ... the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. However, the district court here had already found, "No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." App. 65a. Respondents never address this critical finding. They fail to show that the circumstances of the hotel guests fall within the *Montana* exception for consensual relationships.

Instead, respondents propose their own standard for tribal taxation, based on whether the hotel's guests tacitly accepted "the benefits of civilized society" and police protection and other unspecified governmental services from the tribe.

Respondents' Br. at 8, 11-13. In their view, the hotel's "guests have consented to the jurisdiction of the Navajo Nation by entering the Navajo Nation territory. . . ." *Id.* at 13. They stress that Atkinson's guests "travel across the Navajo Nation to Atkinson's business location, all within the territory of the Navajo Nation." *Id.* Of course, this "territory-based analysis" (*id.*) is precisely the theory that this Court rejected in *Strate* when it held that nonmembers do not become subject to tribal jurisdiction simply because they enter the reservation on a public highway. As a number of States point out in their *amicus* brief, respondents' expansive theory would "overrule *Strate* sub silentio." *See* Brief of Amicus Curiae States of South Dakota, Alabama, Colorado, Florida, Michigan, Mississippi, Montana, Utah and Wyoming in Support of Petitioner at 9 ("States' Br.").[1]

Respondents' standard completely divorces the issue of tribal authority over nonmembers from the touchstone of that authority—the power to exclude nonmembers from tribal lands. *See* Pet. at 11-13. Under the amorphous standard proposed by respondents, the issue of the ownership of the land—made so central to the determination of tribal authority by *Montana* and *Strate*—would have *no role whatsoever* in the jurisdictional inquiry. *See* Respondents' Br. at 11 ("the fact that Atkinson Trading is a nonmember conducting business with mostly nonmembers on fee land has no bearing on the Navajo Nation's power to tax, so long as the activity to be taxed is within the governmental jurisdiction of the tribe").

Respondents seek support for their approach in *Merrion v. Jicarilla Apache Tribe*. In *Merrion*, however, the Jicarilla

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[1] In the related context of tribal criminal jurisdiction, this Court has expressly rejected an identical theory of "implied consent." In *Duro v. Reina*, 495 U.S. 676 (1990), the Court refused to adopt "the argument that any person who enters an Indian community should be deemed to have given implied consent to tribal criminal jurisdiction over him." *Id.* at 695.

Apache tribe sought to tax nonmember oil and gas production on *tribally owned* lands. Unlike the Navajo Reservation, the Jicarilla Apache Reservation was composed *entirely* of tribal trust property. *Merrion*, 455 U.S. at 133. In addition, the taxpayer in *Merrion* had entered into a commercial mineral lease directly with the tribe. These factual distinctions explain the holding of that decision and the absence of any discussion of *Montana* in *Merrion*.

Nevertheless, respondents' citation of some broad language from *Merrion* demonstrates the confusion that is possible when the reasoning of *Merrion* is divorced from its particular factual context. For instance, respondents quote a passage from *Merrion* in which the Court described the power to tax as "an essential attribute of Indian sovereignty." Respondents' Br. at 12. That entire passage, however, was explaining the holding of *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). Key to the Court's discussion is the preceding sentence, omitted by respondents, which restates *Colville*'s holding that " '[t]he power to tax transactions *occurring on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty . . . .' " *Merrion*, 455 U.S. at 137 (citation omitted) (emphasis added). Thus, the "inherent sovereignty" discussed by the *Merrion* Court is nothing more than the tribe's power to regulate conduct on its own lands or involving transactions with the tribe itself, a power consistent with the rule of *Montana*.

As *Strate* recognizes, *Montana* is the "pathmarking case" for all exercises of civil jurisdiction by a tribe over nonmember conduct occurring on non-Indian land. *See Strate*, 520 U.S. at 445. *Merrion*, on the other hand, established a much narrower rule that applies only to the exercise of tribal taxation authority over nonmembers on *tribal land*. This case thus presents this Court with the opportunity to clarify the roles of these two separate lines of

authority in determining the scope of tribal authority over nonmembers.

Similarly, respondents' continuing reliance on the Eighth Circuit's decision in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), confirms the need for this Court's guidance. *Buster* is a century-old case of dubious validity that exacerbates, rather than illuminates, the existing conflict on tribal taxation of nonmembers.

In the first place, much of the broad permissive language of *Buster* is inconsistent with this Court's more recent decisions in *Montana* and *Strate*. For instance, the Eighth Circuit asserted that "every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself." 135 F. at 950. That bedrock assumption of *Buster* cannot be reconciled with *Montana*'s observation that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." 450 U.S. at 563. In fact, this Court has emphasized "the reality that after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation,' . . . and is therefore *not* inherent." *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993) (citation omitted).

In any event, *Buster* involved unique circumstances. There, the tribal tax had been imposed on nonmembers for some time prior to the opening up of the Creek reservation to non-Indian settlers. Moreover, Congress had required presidential approval before any Creek ordinance became effective, 30 Stat. 495, 518 ¶ 33 (June 28, 1898); the President had signed the Creek ordinance, *see* 135 F. at 954, 956; and the Interior Department had promulgated a regulation authorizing Indian Agents to collect the permit tax, *id.* at 957. All of these actions occurred prior to the purchase of any fee land and provided a predicate for any conclusion

that traders could be required to pay a permit tax for the privilege of doing business on the reservation.

Respondents note that on various occasions this Court has sought to explain *Buster*. In the most recent decision, this Court viewed *Buster* as falling within *Montana*'s first exception for "consensual relationships." *Strate*, 520 U.S. at 457. This characterization, on its face, suggests that *Buster* would have no applicability to a case where the tax is imposed on hotel guests who have no consensual relationship with the tribe. Respondents' reliance on *Buster* again illustrates the need for clarification by this Court.[2]

This Court has never reached the important issue presented in the petition—the scope of tribal taxation authority over non-Indians on fee land. Petitioner believes that the resolution of this issue is governed by the straightforward analysis of *Montana* and *Strate*, but the Tenth Circuit and the Navajo Nation read some language in this Court's opinions more broadly to conclude otherwise. The petition should be granted to clarify the distinct roles played by *Montana* and *Merrion* in questions of tribal taxation.

II. RESPONDENTS' BRIEF HIGHLIGHTS THE CONFLICT AMONG THE CIRCUITS

Respondents devote a great deal of space in their brief to explaining and defending the Ninth Circuit's decision in *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899. *See* Respondents' Br. at 12-13, 16-17. Respondents suggest that *Blackfeet Tribe* provides critical support for the decision of the court of appeals in this case, in that it accepts respondents' vague notion of taxation based on potential

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[2] Indeed, at this point, the various statements by this Court concerning the significance of *Buster* may make it more difficult for the courts of appeals to achieve harmony—a further reason for Supreme Court review.

benefits. However, respondents' heavy reliance on *Blackfeet Tribe* only further demonstrates the need for granting of the petition, because the Ninth Circuit has since *expressly* disavowed that case. In *Big Horn County*, the Ninth Circuit held that "*Blackfeet Tribe* is no longer good law." 219 F.3d at 953. That opinion's "failure to apply *Montana*," the *Big Horn County* court held, "undermines its precedential value." *Id.* at 953.[3]

Thus, as the States and other *amici* confirm, the Ninth and Tenth Circuits are now in "irreconcilable conflict." States' Br. at 12. Respondents argue that *Big Horn County* is distinguishable from this case in that it involved a different kind of tax, but do not explain why that would be significant. What is clear is that the two circuits hold opposite views on the significance of *Merrion* for taxes imposed on non-members on fee land or its equivalent. The *Big Horn County* decision expressly rejected reliance on *Merrion* in that context, *id.* at 952, while the Tenth Circuit placed substantial reliance upon it. App. 11a-13a. Thus, in their underlying logic, these cases have created an unavoidable conflict.

That conflict is illustrated by a group of district court decisions that have applied *Big Horn County* to taxes nearly identical to the hotel tax at issue here. *See, e.g., Rose v. Adams*, No. CV-99-1260BLG-JDS (D. Mont. Aug. 7, 2000), *reprinted in* App. 125a-134a. Indeed, a Montana district court has recently invalidated a resort tax on the gross receipts of a trading post identical in nature to Cameron

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[3] Similarly, respondents cannot derive support from the Ninth Circuit's decision in *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000). *Red Wolf* did not involve a tax issue; thus, its discussion of *Merrion* was dictum at best. *Red Wolf* was superseded by *Big Horn County*, which directly addresses taxing authority. A petition for en banc rehearing of *Big Horn County*, based partly on *Red Wolf*, was denied without a single contrary vote.

Trading Post. *See* Brief Amicus Curiae of Pacific Legal Foundation *et al.* at 11-12 ("Pacific Legal Foundation Br.") (discussing *Thompson v. Adams*, No. 98-110 (D. Mont. Aug. 7, 2000)). In *Thompson*, the district court applied the principles of *Big Horn County* to invalidate a Crow tribal tax that clearly would have been upheld under the Tenth Circuit's permissive rule in this case. These cases, ignored by respondents in their brief, furnish proof positive that, regardless of the specific taxes involved in the two circuit decisions, their logic is in inexorable conflict.

The implications of that conflict are not addressed by respondents at all, but they are confirmed in the briefs of the *amici curiae*. Nine States located in six different circuits have explained that the uncertainty created by the Tenth Circuit will lead "to new rounds of vexing, divisive litigation." States' Br. at 8. A definitive decision by this Court would not only "aid in the avoidance of conflict, but it will allow the States to fashion their own policies to integrate state and tribal taxation authority in ways beneficial to both." *Id.* at 1. As the Pacific Legal Foundation points out, almost half of the people living on Indian reservations are non-Indians, and their fee land is already subject to state taxation. Pacific Legal Foundation Br. at 4, 9-10. The Tenth Circuit's decision is "particularly troubling" to captive taxpayers like interstate pipelines and railroads, who are "the most visible, and vulnerable" targets for tribal taxing ordinances. *See* Brief of *Amicus Curiae* Interstate Natural Gas Association of America at 2-3.

In fact, what is most troubling about tribal taxation of nonmembers is that the people and entities bearing the substantial burden of paying the taxes have no say in the process through which those taxes are imposed. Tribal

governments are closed to those lacking tribal membership.[4] Moreover, tribal governments are not subject to those constitutional constraints that prevent States from imposing uneven taxation on outsiders. *See* Pacific Legal Foundation Br. at 6. Thus, even before the Tenth Circuit's decision, tribal taxes imposed on nonmembers were increasing. *Id.* at 5-6. The decision below—if not reviewed—will undoubtedly magnify that problem.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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November 1, 2000

[4] Thus, cases invoking the "benefits of a civilized society" to permit state taxes (*see* Respondents' Br. at 11-12) are inapposite, since *all* citizens living within a State's borders have an equal right under the constitution to participate in state elections.